

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

DIRECTV, INC.,

Plaintiff,

v.

Case No. 1:03-CV-13

RONALD GILLIAM,

HON. GORDON J. QUIST

Defendant.

OPINION

Plaintiff, DIRECTV, Inc. ("DIRECTV"), has sued Defendant, Ronald Gilliam ("Gilliam"), alleging that he violated the Federal Communications Act of 1934, 47 U.S.C. § 605, the Omnibus Crime Control and Safe Streets Act of 1968, as amended by the Electronic Communications Privacy Act of 1986, and the Communications Assistance for Law Enforcement Act of 1994, 18 U.S.C. §§ 2510-22 (the "Wiretap Act"), and Michigan common law by purchasing and using access cards and other devices ("Pirate Access Devices") to decrypt, receive, and view DIRECTV's encrypted satellite transmissions of television programming. DIRECTV seeks injunctive relief, statutory damages, or, in the alternative, compensatory and punitive damages, attorney fees and costs. Now before the Court is Gilliam's motion for summary judgment.

I. Facts

DIRECTV is one of the nation's largest providers of satellite television programming. DIRECTV delivers its broadcasts throughout the United States to customers who have paid a subscription fee. In order to receive the broadcasts, a DIRECTV subscriber must possess a satellite

dish, an integrated receiver/decoder, and an access card to unscramble the signals. DIRECTV provides this equipment to its subscribers either for free or for a small fee. The access card, otherwise known as an ISO-7816 compliant smart card, is roughly the size of a credit card and contains a small microprocessor chip that is inserted into a DIRECTV receiver. DIRECTV programs the subscriber's access card with data corresponding to the subscriber's level of service. In other words, the cards are electronically programmed to block or unblock television channels and specific programs to include only the programming for which the subscriber has paid.

In spite of DIRECTV's efforts to prevent unauthorized reception and use of its programming, individuals have sought to illegally decrypt and intercept DIRECTV's signal without authorization by use of various Pirate Access Devices. Although Pirate Access Devices vary in type, they essentially allow the user to modify the access card to circumvent DIRECTV's security measures and decode its satellite signals.

On May 25, 2001, DIRECTV executed writs of seizure at the mail shipping facility used by several major suppliers of Pirate Access Devices, including Vector Technologies; DSS-Stuff; Shutt, Inc.; Intertek; WhiteViper; and DSS-Hangout (the "Suppliers"). Among other things, DIRECTV obtained shipping records, email communications, and credit card receipts identifying purchasers, or end-users, of illegal Pirate Access Devices from the Suppliers. DIRECTV used that information to obtain settlements (including monetary payments, stipulated injunctive relief, and turnover of the devices) from end-users or, failing a settlement, to sue end-users in federal court. This is one of perhaps thousands of suits DIRECTV has filed throughout the country against end-users.

In the spring of 2000, Gilliam purchased a reader/writer smart card programmer ("Reader/Writer") from WhiteViper Technologies. (Gilliam Dep. at 20, Pl.'s Br. Opp'n Ex. 2.)

Gilliam testified that he purchased the Reader/Writer because he was interested in learning about programming smart cards and smart card technology. (Id. at 17-19.) Gilliam testified that he attempted to use the Reader/Writer to program blank smart cards but his attempts were unsuccessful. (Id. at 22.) Gilliam claims that he did not have the software required to program smart cards. (Id. at 21.) Subsequently, Gilliam purchased an unlooper ("Unlooper") with "Wildthing" from WhiteViper. (Id. at 23-24.) Gilliam knew that the Unlooper could be used to intercept DIRECTV signals but claims that he did not purchase it for that purpose. (Id. at 24-25.) Gilliam stated that he was unable to use the Unlooper to program blank smart cards. (Id. at 26.) Gilliam put the Unlooper in a drawer until a representative from DIRECTV informed him that unloopers were illegal, at which point he got rid of them. (Id. at 27.) Several months after he disposed of the Reader/Writer and the Unlooper, Gilliam purchased cases for the devices and an SU2 chip upgrade from WhiteViper Technologies. (Id. at 28-29.) At all relevant times, Gilliam was a DIRECTV subscriber and possessed all of the necessary equipment to receive DIRECTV's satellite signals. (Id. at 11-12.) Gilliam claims that he has never received any DIRECTV programming for which he has not paid. (Id. at 38.)

II. Summary Judgment Standard

Summary judgment is appropriate if there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law. Fed. R. Civ. P. 56. Material facts are facts which are defined by substantive law and are necessary to apply the law. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 106 S. Ct. 2505, 2510 (1986). A dispute is genuine if a reasonable jury could return judgment for the non-moving party. Id.

The court must draw all inferences in a light most favorable to the non-moving party, but may grant summary judgment when "the record taken as a whole could not lead a rational trier of fact to find for the non-moving party." Agristor Financial Corp. v. Van Sickle, 967 F.2d 233, 236 (6th Cir. 1992) (quoting Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 587, 106 S. Ct. 1348, 1356 (1986)).

III. Discussion

In its complaint, DIRECTV asserts four separate claims, including: (1) unauthorized reception of satellite signals in violation of 47 U.S.C. § 605(a); (2) unauthorized interception of satellite communications in violation of 18 U.S.C. § 2511(1)(a); (3) possession of pirate access devices in violation of 18 U.S.C. 2512(1)(b)¹; and (4) conversion. DIRECTV has stated that it will not pursue the third and fourth claims against Gilliam and that those claims should be considered withdrawn. (Pl.'s Br. Opp'n Def.'s Mot. at 8 n.2.) Thus, the only claims before the Court are DIRECTV's claims under 47 U.S.C. § 605(a) and 18 U.S.C. § 2511(1)(a).

Gilliam has moved for summary judgment on the ground that DIRECTV has failed to create a genuine issue of material fact as to the alleged violations of 47 U.S.C. § 605(a) and 18 U.S.C. § 2511(1)(a). Gilliam further argues that DIRECTV has failed to state a claim under 18 U.S.C. § 2511(1)(a).²

¹This claim is actually denominated as possession of pirate access devices in violation of 18 U.S.C. § 2511(1)(b) but the Court understands this claim to be based upon § 2512(1)(b) in light of the references to § 2512(1)(b) in the body of the claim as well as the Court's review of the statutes.

²Gilliam also raises the same arguments in his motion with regard to DIRECTV's claims under 18 U.S.C. § 2512. However, the Court need not address those arguments because, as noted, DIRECTV has expressly withdrawn its claim based upon § 2512. Therefore, that claim and the conversion claim will be dismissed with prejudice.

A. Motion For Summary Judgment

1. Violation Of 47 U.S.C. § 605(a)

In its first claim, DIRECTV alleges that Gilliam received and assisted others in receiving DIRECTV's satellite transmissions in violation of 47 U.S.C. § 605(a). That provision states, in pertinent part:

[N]o person receiving, assisting in receiving, transmitting, or assisting in transmitting, any interstate or foreign communication by wire or radio shall divulge or publish the existence, contents, substance, purport, effect, or meaning thereof, except through authorized channels of transmission or reception, (1) to any person other than the addressee, his agent, or attorney, (2) to a person employed or authorized to forward such communication to its destination, (3) to proper accounting or distributing officers of the various communicating centers over which the communication may be passed, (4) to the master of a ship under whom he is serving, (5) in response to a subpoena [sic] issued by a court of competent jurisdiction, or (6) on demand of other lawful authority. No person not being authorized by the sender shall intercept any radio communication and divulge or publish the existence, contents, substance, purport, effect, or meaning of such intercepted communication to any person. No person not being entitled thereto shall receive or assist in receiving any interstate or foreign communication by radio and use such communication (or any information therein contained) for his own benefit or for the benefit of another not entitled thereto. No person having received any intercepted radio communication or having become acquainted with the contents, substance, purport, effect, or meaning of such communication (or any part thereof) knowing that such communication was intercepted, shall divulge or publish the existence, contents, substance, purport, effect, or meaning of such communication (or any part thereof) or use such communication (or any information therein contained) for his own benefit or for the benefit of another not entitled thereto. This section shall not apply to the receiving, divulging, publishing, or utilizing the contents of any radio communication which is transmitted by any station for the use of the general public, which relates to ships, aircraft, vehicles, or persons in distress, or which is transmitted by an amateur radio station operator or by a citizens band radio operator.

47 U.S.C. § 605(a). Any person aggrieved by a violation of subsection (a) may bring a civil action in federal court. 47 U.S.C. § 605(e)(3)(A). In order to prevail on its claim under this section,

DIRECTV must prove that Gilliam received, assisted in receiving, or intercepted DIRECTV satellite transmissions. See DIRECTV, Inc. v. Moreno, No. 03-2478 (JEI), 2003 WL 22927883, at *2 (D.N.J. Dec. 11, 2003); DIRECTV, Inc. v. Karpinsky, 269 F. Supp. 2d 918, 926 (E.D. Mich. 2003), vacated in part upon reconsideration, 274 F. Supp.2d 918 (E.D. Mich. 2003); Joe Hand Promotions, Inc. v. Rennard Street Enters., Inc., 975 F. Supp. 746, 753 (E.D. Pa. 1997).

In spite of his admissions that he possessed all of the equipment necessary to receive DIRECTV's satellite signals and that he purchased equipment which could be used to decrypt and receive DIRECTV's signal, Gilliam contends that he is entitled to summary judgment because DIRECTV has failed to offer any evidence showing that Gilliam used the pirate devices to actually receive or intercept DIRECTV's signal. In support of his argument, Gilliam relies heavily upon V Cable, Inc. v. Guercio, 148 F. Supp. 2d 236 (E.D.N.Y. 2001), which Gilliam asserts is on point with this case. In V Cable, the plaintiff alleged that the defendant violated 47 U.S.C. § 605(a) by purchasing and using or distributing pirate cable descrambling devices. The court held that the plaintiff failed to show that it was an "aggrieved party" entitled to bring an action for violation of § 605(a) because there was no evidence that the defendant distributed or used the pirate devices within the plaintiff's market area or elsewhere. The court stated:

A perusal of the statutes underlying the present action indicates that it is not a crime, nor a basis for a civil claim, for an individual to purchase or possess pirate descrambling devices, even if it appears that possession is with the intent to distribute. . . .

. . . .

Cablevision concedes that it has no direct evidence that defendant either used or distributed any of the items purchased from either Global or J.E.S. Moreover, it has offered no evidence, such as unexplained bank deposits in amounts suggesting he was selling descramblers, or other circumstantial evidence of sale.

Id. at 242-43. In addition, the court held that the plaintiff failed to show that the defendant used one or more of the descramblers. The court observed that there was no evidence that the defendant decreased the level of his cable service following his receipt of the descramblers, which "arguably would be some evidence of his usage of an illegal device," and there was no testimony from the defendant, his family members, or neighbors, that they viewed programming beyond that covered by the defendant's subscription. Id. at 244-45. Gilliam contends that as in V-Cable, there is no evidence that he actually received additional DIRECTV programming.³

DIRECTV counters that V-Cable is inapposite to this case because it was not, as Gilliam claims, a summary judgment opinion, but instead was the district court's findings of fact and

³On January 30, 2004, Gilliam filed a Notice of Supplemental Authority attaching copies of thirteen opinions and/or orders from other district courts in various DIRECTV cases. The bulk of the opinions and/or orders dealt with the issue of whether DIRECTV may maintain a claim for violation of 18 U.S.C. § 2512 based upon mere possession of a Pirate Access Device. Those opinions and orders are not relevant to the issues in these cases in light of DIRECTV's express withdrawal of its claim under § 2512. Only two of the cited opinions addressed DIRECTV's claim under § 2511 for actual interception. The first, an order from the Eastern District of North Carolina, held that DIRECTV is not entitled to bring a claim under 18 U.S.C. § 2520 based upon a violation of § 2511 because the damages provision, subsection (c), provides for damages only where the defendant views a satellite video transmission that is not scrambled or encrypted. The Court disagrees with this conclusion because subsection (c)(2) provides for actual or statutory damages "[i]n any other action," which would include the situation here, where the satellite signal is scrambled or encrypted. See 18 U.S.C. § 2520(c)(2). The second opinion and order pertaining to a DIRECTV claim under § 2511 is the opinion in DIRECTV, Inc. v. Cavanaugh, NO. 03-60001 (E.D. Mich. Nov. 18, 2003). The opinion in Cavanaugh does not help Gilliam, because the court in that case held that DIRECTV's circumstantial evidence was sufficient to defeat the defendant's motion for summary judgment. The defendant denied that he used the device to intercept DIRECTV's signal. DIRECTV's evidence was that: (1) the defendant was a DIRECTV subscriber; (2) the defendant purchased a pirate device; (3) the defendant's account history with DIRECTV showed decreases in subscription to premium channels or movies that corresponded with the dates of purchase of the pirate devices; and (4) the defendant complained of equipment failure that likely resulted from illegal tampering. The court held that the evidence "support[ed] the reasonable inference that signal theft did in fact occur." DIRECTV, Inc. v. Cavanaugh, No. 03-60001, slip op. at 9 (E.D. Mich. Nov. 18, 2003).

conclusions of law after a trial. In addition, DIRECTV contends that V-Cable is distinguishable because the plaintiff in V-Cable relied solely upon evidence that the defendant purchased pirate cable devices, whereas DIRECTV has presented substantially more evidence showing that Gilliam actually intercepted or received DIRECTV's satellite signal. In particular, DIRECTV contends that the following evidence is sufficient to create a genuine issue of fact as to whether Gilliam actually intercepted DIRECTV's satellite signal: (1) Gilliam owned all of the equipment necessary to intercept DIRECTV satellite signals; (2) Gilliam bought the Reader/Writer and the Unlooper, devices whose sole purposes are to modify DIRECTV access cards to disable their security features and to reprogram such cards; (3) Gilliam continued to purchase accessories for the Reader/Writer and Unlooper several months after he purchased them, in spite of his claim that he was unable to use the devices for his intended purpose; (4) Gilliam's purchase of the Unlooper is evidence that he already possessed an illegally modified DIRECTV access card or that he intended to use the Unlooper to modify DIRECTV access cards in the future; and (5) Gilliam's subscriber history provides further evidence that Gilliam actually received or intercepted DIRECTV programming.

DIRECTV contends that the opinions in DIRECTV v. Karpinsky show that DIRECTV has presented more than sufficient evidence to survive Gilliam's motion for summary judgment. In Karpinsky, the defendant moved for summary judgment based upon his testimony that he was not and never had been a DIRECTV subscriber and that he did not possess the satellite dish and receiver required to receive DIRECTV's satellite transmissions. DIRECTV v. Karpinsky, 269 F. Supp. 2d 918, 926 (E.D. Mich. 2003). DIRECTV failed to offer evidence rebutting the defendant's evidence, however, it opposed the motion by citing (1) the defendant's purchase and possession of two "Smartcard Recovery System" devices in 2001; (2) statements by DIRECTV's vice president to the

effect that the devices had no legitimate personal or commercial use, other than to assist in the interception and decryption of DIRECTV signals; and (3) statements by the vice president that anyone who visited the website of the company from which the defendant purchased the device would know that the devices were advertised primarily for use in illegal reception of DIRECTV's signals. The court concluded that while DIRECTV's evidence raised a possible inference that the defendant possessed the devices knowing that they were primarily used to unlawfully intercept DIRECTV signals, a reasonable fact-finder could not infer that the defendant unlawfully intercepted DIRECTV's signals in light of the evidence that the defendant was not a DIRECTV subscriber and did not possess the equipment needed to intercept the signals. Id. at 927. Shortly after the court granted summary judgment to the defendant, DIRECTV moved for reconsideration, citing evidence indicating that the defendant had in fact purchased a DIRECTV system and therefore had the ability to intercept DIRECTV's signals. DIRECTV v. Karpinsky, 274 F. Supp. 2d 918, 921 (E.D. Mich. 2003). The court granted the motion because it found that based upon the new evidence, a reasonable fact-finder could infer that the defendant did in fact unlawfully intercept or aid in intercepting DIRECTV's signals using the devices. Id. DIRECTV contends that the Karpinsky opinions, considered together, implicitly support the proposition that a defendant's purchase of a Pirate Access Device, coupled with evidence of the defendant's purchase or possession of a DIRECTV satellite system, is sufficient to withstand a motion for summary judgment.

A plaintiff need not produce direct evidence to establish that a communication was received or intercepted, but may rely upon circumstantial evidence to do so. See Walker v. Darby, 911 F.2d 1573, 1578 (11th Cir. 1990) (holding that circumstantial evidence may be used to prove a wiretap claim, including actual interception). In Ages Group L.P. v. Raytheon Aircraft Co., Inc., 22 F. Supp.

2d 1310 (M.D. Ala. 1998), the court found that the plaintiff presented sufficient evidence to survive the defendant's motion for summary judgment. The defendant argued that the evidence showed that there was only video surveillance, which was not illegal, without interception of the contents of any communications. Although the court stated that "proof of possession of equipment used to intercept oral communications could certainly be part of [the plaintiff's] proof that oral communications were intercepted," the claim survived because there was other substantial evidence, including eyewitness testimony showing that the defendant's employees were using listening devices. Id. at 1316. The court rejected the defendant's argument that even if its agents possessed equipment capable of intercepting communications, there was no evidence that the communications were actually intercepted. The court noted that the circumstantial evidence established that the agents possessed equipment consistent with monitoring and receiving oral communications and that one of the agents was observed wearing a headset which would only be used if the microphone and recorder were being used. Id. at 1318-19.

In Gross v. Taylor, No. Civ. A. 96-6514, 1997 WL 535872 (E.D. Pa. Aug. 5, 1997), two police officers sued the police chief, two sergeants, the police department, and others alleging, among other things, violations of the federal and state wiretap laws. The police department had installed audiovisual surveillance systems in certain patrol cars for the purposes of collecting evidence and protecting the police from liability. The systems included a microphone which was installed in the back seat of the car. The existence of the rear-seat microphone was apparently not disclosed to the officers during the training session for use of the system. Prior to the training, the plaintiffs discovered the existence of the rear-seat microphones, but they did not share the information with their supervisors until almost a month later, when another officer discovered that

his system recorded sound as well as video. The police department removed the rear-seat microphones within two days of learning of their existence. The court held that the defendants were entitled to summary judgment on the wiretap claims because, among other things, the plaintiffs failed to present evidence establishing an actual interception. In its analysis, the court found or assumed that both plaintiffs established that they used a patrol car which was equipped with a rear-seat microphone during the relevant time period and that the system was capable of recording sounds. Id. at *5. However, the court concluded that such evidence was insufficient to create a genuine issue of fact about whether there was an actual interception because the plaintiffs failed to "present[] any evidence substantiating any claim beyond that they were in cars with systems capable of recording." Id. The court acknowledged the difficulties a plaintiff faces in proving a wiretap claim and that because of those difficulties courts have held that direct evidence of specific conversations is not necessary, but it observed that those cases do not allow a plaintiff to establish a claim upon "the barest of circumstantial evidence." Id. at *6. The court noted that in cases allowing proof by circumstantial evidence, the evidence was "substantial" and included "statements by the defendants to third parties that they engaged in wiretapping, evidence of targeting the plaintiffs for bugging by installing a microphone in his or her office, actual tapes of intercepted conversations, evidence of a pattern of wiretapping, and testimony that the defendant was remotely monitoring the plaintiff." Id. The court concluded that summary judgment was appropriate, given the absence of such evidence in that case.

Ages Group and Gross both establish that it is not enough for a plaintiff merely to show that a defendant possessed equipment capable of intercepting a communication in order to show that the defendant actually received or intercepted the plaintiff's communication. Rather, the plaintiff must

produce circumstantial evidence sufficient to support the conclusion that there was an actual inception.

DIRECTV's evidence is that (1) Gilliam was a DIRECTV subscriber who possessed the necessary equipment to intercept DIRECTV's satellite signal; (2) Gilliam was aware that the Reader/Writer and the Unlooper could be used to alter his DIRECTV access card; (3) Gilliam continued to purchase accessories for the devices in spite of his testimony that he was unable to make them work for any purpose; and (4) the Unlooper Gilliam purchased from WhiteViper was designed to alter DIRECTV access cards, either by undoing the effects of DIRECTV's electronic countermeasures on altered cards or by altering legitimate access cards. In addition, DIRECTV contends that evidence of Gilliam's subscriber history provides evidence of Gilliam's pirate activities. Specifically, DIRECTV states that on five occasions over the course of his subscriber history, Gilliam requested new access cards, either because there were problems with his card or because his children lost them. (Subscriber history, Pl.'s Br. Opp'n Ex. 4.) DIRECTV asserts that this evidence is consistent with pirate activity because people who engage in pirate activity often have access cards that have been damaged by DIRECTV's electronic countermeasures or by their own pirate devices.

The Court concludes that this evidence is sufficient to create a genuine issue of material fact. Gilliam claims that he ordered the Reader/Writer and Unlooper for purposes unrelated to the interception of DIRECTV signals and that he was never able to make the devices work to program smart cards. On the other hand, DIRECTV has presented testimony from its expert witness that the Unlooper was designed solely for the purpose of modifying DIRECTV access cards for the purpose of intercepting DIRECTV's signals. Combined with DIRECTV's evidence that Gilliam has received several replacement access cards, a reasonable fact-finder could infer from this evidence that Gilliam

actually purchased the devices in order to alter his DIRECTV access cards in order to receive intercept DIRECTV's satellite signal and that he actually used the devices for that purpose.⁴

2. Violation Of 18 U.S.C. § 2511(1)(a)

As discussed above, in order to establish its claim that Gilliam violated § 2511(1)(a), DIRECTV must show that Gilliam intercepted DIRECTV's signal. For the same reasons that DIRECTV's evidence has created a genuine issue of material fact with respect to the claim under 47 U.S.C. § 605(a), the Court concludes that DIRECTV's evidence also creates a genuine issue of material fact with regard to Gilliam's interception of DIRECTV's signal under § 2511(1)(a). Therefore, the Court will also deny Gilliam's motion on this claim.

B. Motion To Dismiss

Gilliam argues that DIRECTV's claim under 18 U.S.C. § 2511 must be dismissed because that section is a criminal provision which does not provide for a civil cause of action. This argument must be rejected, because while § 2511 itself does not provide for a private right of action, it is well established that § 2520(a) provides a private right of action for violations of § 2511. See DIRECTV, Inc. v. Cardona, 1357, 1368-69 (M.D. Fla. 2003); Gunderson v. Gunderson, No. 02-1078-CVW-ODS, 2003 WL 1873912, at *1 (W.D. Mo. Apr. 14, 2003); DIRECTV v. Westendorf, No. 03 C 50210, 2003 WL 22139786, at *1 (N.D. Ill. Sept. 16, 2003); In re DoubleClick Inc. Privacy Litig., 154 F. Supp. 2d 497, 514 n.22 (S.D.N.Y. 2001). Gilliam's argument is really that DIRECTV fails to state a claim because it cites only § 2511 in its second claim and does not mention § 2520(a).

⁴DIRECTV has attached its records regarding Gilliam's subscriber history as an exhibit to its brief in opposition to Gilliam's motion but has made no attempt to elaborate on those records. The Court has reviewed the records and has attempted to make sense of the information, to the extent that the purport of the information is apparent from the face of the documents.

However, DIRECTV cites § 2520(a) in its prayer for relief, and it is sufficiently clear that DIRECTV is alleging that Gilliam violated § 2511(1)(a) as part of its claim under § 2520(a). Thus, DIRECTV states a claim for violation of § 2511(1)(a).

IV. Conclusion

For the foregoing reasons, the Court will deny Gilliam's motion for summary judgment. The Court will dismiss DIRECTV's claim based upon the alleged violation of 18 U.S.C. § 2512 and DIRECTV's conversion claim.

An Order consistent with this Opinion will be entered.

Dated: February 2, 2004

/s/ Gordon J. Quist
GORDON J. QUIST
UNITED STATES DISTRICT JUDGE